No. 3039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

QUAN HING SUN and JUNG LIM,
Appellants,

vs.

EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

PETITION FOR REHEARING ON BEHALF OF APPELLEE.

ANNETTE ABBOTT ADAMS,
United States Attorney,

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Attorneys for Appellee.

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To the Honorable William B. Gilbert, Presiding Judge and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions the United States Circuit Court of Appeals for the Ninth Circuit for a rehearing in the above entitled cause following the judgment and opinion filed therein on October 11, 1918, whereby the decree of the United States District Court for the Northern District of California, First Division, was reversed, and respectfully asks that further consideration be given to certain propositions of law bear-

ing upon the case and to certain statements made in appellants' brief which do not coincide or agree with the facts as disclosed in respondent's Exhibit "A."

It is argued by appellants that a person of Chinese descent seeking admission into the United States, claiming to be a citizen thereof, is by right entitled to have his status as a citizen and his right of admission as such determined by a Board of Special Inquiry, as provided by Sections 24 and 25 of the General Immigration Act of February 20, 1907 (34 Stats. at L. 898), instead of by the gauge and method provided for in the Chinese Exclusion Act and that there cannot be two separate ways of determining American citizenship with due regard to the equal rights of all citizens before the law.

It is the Government's contention that all Chinese persons and persons of Chinese descent applying for admission into the United States, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship, as when it is domicile, and the belonging to a class exempted from the Exclusion Acts, are subject to examination as to their right of entry under the provisions of the Chinese Exclusion Laws and the Rules and Regulations issued pursuant thereto. That the general Immigration Act and the Chinese Exclusion Laws are two separate and distinct acts, applying to different classes of aliens and each is to stand in its integrity and efficacy.

The first general Immigration Act was passed March 3, 1891 (26 Stat. at L. 1084). Under Section 7 of this Act the office of Superintendent of Immigration was created. It also provides that "the Superintendent of Immigration shall be an officer of the Treasury Department under the control and supervision of the Secretary of the Treasury."

Section 8 provides that "all decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury."

No Board of Special Inquiry was created under this statute, the decision in each case resting in the individual inspector with appeal in case of an adverse decision to the Superintendent of Immigration and the Secretary of the Treasury.

A Board of Special Inquiry was first created by the Act of March 3, 1893 (27 Stat. at L. 569), entitled "An Act to Facilitate the Enforcement of Immigration and Contract Labor Laws of the United States." Section 5 of the Act provides that "it shall be the duty of every inspector of arriving alien immigrants to detain for a special inquiry under Section 1 of the Immigration Act of March 3, 1891, every person who may not appear to him to be clearly and beyond a doubt entitled to admission and all special inquiries shall be conducted by not less than four officials acting as inspectors, to be

designated in writing by the Secretary of the Treasury or by the Superintendent of Immigration for conducting special inquiries; and no immigrant shall be admitted upon special inquiry except after a favorable decision made by at least three of said inspectors and any decision to admit shall be subject to appeal by any dissenting inspector to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury, as provided in Section 8 of said Immigration Act of March 3, 1891."

Section 10 of the Act provides however "*that this Act shall not apply to Chinese persons.*"

In the General Appropriation Act of August 18, 1894, (28 Stat. at L. 390), it was enacted that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

By the Act of March 2, 1895 (28 Stat. at L. 780), it was provided that the "Superintendent of Immigration, who shall hereafter be designated as Commissioner General of Immigration and in addition to his other duties shall have charge under the Secretary of the Treasury of the administration of the Alien Contract Labor Laws."

By the Act of June 6, 1900 (31 Stat. at L. 611), it was

provided that "hereafter the Commissioner General of Immigration, in addition to his other duties, shall have charge of the administration of the Chinese Exclusion Laws and of the various Acts regulating immigration into the United States, its territories, and the District of Columbia under the supervision and direction of the Secretary of the Treasury."

Up to the time of the passage of the Act of June 6, 1900, the administration of the Chinese Exclusion Laws was vested in the Collector of Customs at the various ports of entry, subject to the supervision and direction of the Secretary of the Treasury, while the administration of the Immigration Act was vested in the Superintendent of Immigration and inspectors appointed at the various ports under the supervision and direction of the Secretary of the Treasury.

The Act of March 3, 1903 (32 Stat. at L. 1213) entitled "An Act to Regulate the Immigration of Aliens into the United States," provides in Sections 10, 24 and 25 thereof for the appointment of boards of inquiry and defines the duties and powers of such boards.

Section 23 provides that "the duties of the Commissioners of Immigration shall be of an administrative character to be prescribed in detail by regulations prepared under the direction, or with the approval of the Secretary of the Treasury."

Section 36 of the Act provides "that all Acts and parts of Acts inconsistent with this Act are hereby

repealed; *provided, that this Act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.*"

By the Act of February 14, 1903, entitled "An Act to Establish the Department of Commerce and Labor" (32 Stat. at L. 825-828), the Commissioner General of Immigration, the Bureau of Immigration and the Immigration Service were transferred from the Treasury Department to the Department of Commerce and Labor and by the Act of March 4, 1913 (37 Stat. at L. 738) to the Department of Labor.

The Act of February 20, 1907 (34 Stat. at L. 898) provides in Section 10, 24 and 25 for the creation of boards of special inquiry and defines their powers and duties thereunder. Section 23 of the Act provides "that the duties of the Commissioners of Immigration shall be of an administrative character to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Commerce and Labor."

Section 43 of the Act provides "that the Act of March 3, 1903, being an Act to regulate the immigration of aliens into the United States, except Section 34 thereof and the Act of March 22, 1904, being an Act to extend exemption from head tax to citizens of Newfoundland entering the United States and all Acts and parts of Acts inconsistent with this Act are hereby repealed; *provided, that this Act shall not be construed*

to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent."

There is not at the present time, nor has there ever been, any provision made in the Chinese Exclusion Laws for the examination by a Board of Special Inquiry of Chinese persons seeking admission into the United States. The law, itself, is silent on the subject except so far as it provides in certain sections that the Secretary of the Treasury is authorized to prescribe such rules as are necessary to carry out said acts.

Section 8 of the Act of September 13, 1888 (25 Stat. at L. 476 and 477) provides "that the Secretary of the Treasury shall be and he hereby is authorized and empowered to make and prescribe and from time to time to change and amend such rules and regulations not in conflict with this Act as he may deem necessary and proper to conveniently secure for such Chinese persons as are provided for in Articles second and third of the said Treaty between the United States and the Empire of China the rights therein mentioned *and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said Articles.*

Section 1 of the Act of April 29th, 1902, as amended and enacted by Section 5 of the Deficiency Act of April 27, 1904 (32 Stat. at L. 176; 33 Stat. at L. 394-428) provides that "all laws in force on the 29th day of April, 1902, regulating, suspending or prohibiting the coming

of Chinese, *or persons of Chinese descent*, into the United States and the residence of such persons therein, including Sections 5, 6, 7, 8, 9, 10, 11, 13 and 14 of the Act entitled "An Act to Prohibit the Coming of Chinese Laborers into the United States, approved September 13, 1888, be and the same are hereby re-enacted, extended and continued without modification, limitation or condition."

Section 2 provides that the "Secretary of the Treasury is hereby authorized and empowered to make and prescribe, and from time to time, change such rules and regulations not inconsistent with the laws of the land as he may deem necessary and proper to execute the provisions of this Act and of the Acts hereby extended and continued, and of the Treaty of December 8, 1894, between the United States and China, and with the approval of the President to appoint such agents as he may deem necessary for the efficient execution of said Treaty and said Acts."

The Supreme Court in the Woo Jan decision, rendered January 28, 1918, U. S. Advanced Opinions 1917, p. 230, has held, in construing Section 43 of the Act of February 20, 1907, that "from all the provisions of the Act (Feb. 20, 1907) the Chinese Exclusion Laws are excepted. They, the latter, are to stand in their integrity and efficacy." Quoting further from this decision, the Court said:

> "We are admonished at the outset by the diversity of opinion that there are grounds for

opposing contentions. Indeed, Secs. 21 and 43 seem to be, at first impression, in irreconcilable conflict. The declaration of Sec. 21 is that the power of the Secretary of Labor shall extend to taking into custody and returning to the country from whence he came whoever is subject to deportation under the provisions 'OF ANY LAW OF THE UNITED STATES.' The universality of the declaration would seem to preclude exception and compel a single judgment. But, passing on to Sec. 43, we find another law preserved and kept in function,—a function so firm and exclusive that it is provided that the act, of which Sec. 21 is but a part, shall not be construed to 'repeal, alter or amend' it. Let us repeat the language—'Provided, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.' There is, therefore, an express qualification of the universality of Sec. 21; indeed, from all of the provisions of the act the Chinese Exclusion Laws are excepted. They, the latter, are to stand in their integrity and efficacy."

* * * * * * *

"We must, indeed, assume that Sec. 43 was intended to be sufficient of itself,—fully exclusive and controlling.

We might terminate the discussion here and leave the case to the explicit language of Sec. 43 that Sec. 21 (to pass at once to the particular) 'shall not be construed to alter, repeal or amend existing laws relating to the immigration or exclusion of Chinese persons.' The Government, however, contends, as we have seen, that this court has decided to the contrary in United States vs. Wong You, supra.

The Government's understanding of the case is erroneous. It concerned Chinese persons, but not

> the Exclusion Laws, and it was decided that such persons might offend against the Immigration Act and be subject to deportation by the Department of Labor if they should so offend. This was the extent of the decision and its language was addressed to the contention that the latter act was applicable to all persons except Chinese because of Sec. 43. The contention was declared to be untenable, and it was untenable. The case, therefore, is different from that at bar, and the opinion was considerate of the difference; that is, considerate of the difference between the Immigration Act and the Exclusion Laws.
>
> This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act."

This decision unmistakedly holds that the Chinese Exclusion Laws and the general Immigration Act are two separate and distinct laws and are to stand as such in their integrity and efficacy. From this decision it seems reasonable to hold that a Chinese person being an alien, applying for admission into the United States, who is found to belong to one of the excluded classes enumerated in the Immigration Act and whose admission is prohibited thereby, might properly be excluded on the grounds that he is seeking admission in violation of that Act, but if, upon examination, he is found admissible under the Immigration Act, his right to final admission must be determined under the Chinese Exclusion Acts, which apply to all Chinese persons and persons of Chinese descent, whatever the ground claimed as a right of admission.

In the case of the United States vs. Ju Toy, 198 U. S. 253, the Court says:

> "It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship as when it is domicile and the belonging to the class excepted from the Exclusion Acts."

It is admitted that a person of Chinese descent, who is a citizen of the United States, is entitled to all the rights and privileges enjoyed by citizens of any other race, but a mere claim of citizenship made by a person of Chinese descent applying for admission to the United States does not of itself establish that fact and such fact can only be established and his right to enter the country be determined in conformity with the Chinese Exclusion Laws and the Rules and Regulations issued in connection therewith.

It is a well established principle that where Congress, by constitutional enactments has entrusted to executive officers as a special tribunal determination of all questions of fact, including a claim of citizenship, relating to the right of entry into the United States of Chinese applying therefor, the decision of such executive officers is final, where no abuse of authority is shown. This point was decided in the case of Ekiu vs. United States, 142 U. S. 660, wherein the Court says:

> "And Congress may, if it sees fit, as in the statutes in question in United States vs. Jung Ah Lung just cited, authorize the Courts to investigate

> and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of these facts may be entrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or contravert the sufficiency of the evidence on which he acted."

The attention of this Honorable Court is called in particular to the following statements contained in appellants' brief, commencing at the bottom of page 7 thereof:—

> "The Immigration procedure allows a complete inspection of the entire record, including the findings and reasonings of the Board of Special Inquiry. The procedure under the Chinese Exclusion Laws withholds this matter from the applicant for admission, only advising him of the final result."

The language of the opinion (page 4) follows closely that of the brief above quoted.

The statements made in the above quotation constitute a bold perversion of the facts as they appear in the record in respondent's Exhibit "A," which was an exhibit in this case. On page 44 of said exhibit will be found the following receipt given by Messrs. McGowan & Worley, attorneys for the applicant:

"Form 2541

San Francisco, Cal., April 3, 1916.

Commissioner of Immigration,
Port of San Francisco.

Sir:—

In re: Quan Hing Sun, Son of Nat. No. 15077/5-30, ex. S. S. China, 3/11, 1916:

In the above entitled case, this date I have been given full opportunity to review the entire record from page 1 to 42, inclusive.

Remarks: Except pages 24, 34, 35 and 36.

Exhibits att'd hereto—
10259/49; 15077/3-8; 12986/7-13.

Respectfully,
(Signed) McGowan & Worley,
Attorney for applicant."

From this it will be seen that the attorneys were permitted to see the entire record in the case, including three exhibits and were only denied the report of the inspector handling the case which was made to the Commissioner of Immigration but which contained no evidence, and which was a mere summary of the evidence to guide the Commissioner in arriving at his decision.

It further appears from the record (pages 47 and 48) that the applicant was further represented by counsel

before the Department in Washington, who were permitted to see the entire record and make an oral argument before the Department.

The appellant attempts to lead this Honorable Court to believe that there is great difference between the procedure followed under the general Immigration Laws and that followed under the Chinese Exclusion Laws in arriving in a decision in the case of a person applying for admission to the United States, while as a matter of fact, there is but very little difference in the two procedures and no difference in the final results.

Under the Chinese Exclusion Laws, the Commissioner, who is the officer in charge and exercises a quasi judicial function passes upon the right of Chinese persons and persons of Chinese descent to enter the United States.

Under the general Immigration Laws the determination of the right of an alien to enter the United States, if denied by the individual inspector, is by law conferred upon a board of special inquiry. Under either procedure an appeal lies to the Secretary of Labor from an adverse decision.

Let us assume, for the sake of argument, that the case of Quan Hing Sun had been heard by a board of special inquiry, as provided under the Immigration Laws, and that the Board, after hearing all the testimony, had arrived at the same conclusion as the inspector who handled the case. The question of the

admission or rejection of the applicant would then be put to a vote; the member first voting to reject the alien should move his rejection on the grounds "that the claimed relationship had not been satisfactorily established and the further grounds that he was not admissible under Rule 9 of the Regulations, both parents then being dead." The next member would second this motion and the Chairman would make it unanimous.

This describes the method pursued in actual practice here by a Board of Special Inquiry in arriving at their decision and it does not, as appellant would lead this Court to believe, write any lengthy opinions or make any other findings than that described above.

It is further urged that the decision of the Secretary was based solely upon the objection that the relationship of the appellant to his alleged father had not been satisfactorily proven.

The memorandum opinion prepared by the Assistant Commissioner General (pages 49, 50 and 51, Exhibit "A"), which was approved by the Secretary of Labor, Honorable William B. Wilson, thereby adopting said opinion as his own, plainly shows that the only ground upon which the applicant was rejected was that of relationship.

That the objectionable features of Rule 9 had been abrogated before said opinion was handed down by the Secretary and that he was not influenced in arriving at

his opinion because of said rule, is shown by the following circular letter addressed to all Commissioners of Immigration and Inspectors in Charge:—

"DEPARTMENT OF LABOR
BUREAU OF IMMIGRATION
WASHINGTON.

54085/26
53884 May 9, 1916.

TO ALL COMMISSIONERS OF IMMIGRATION AND INSPECTORS IN CHARGE:

In conformity with a recent opinion rendered by the Attorney General, on the questions whether Chinese born abroad to a Chinese father, the latter being an American citizen by birth, are citizens of the United States (a) during their minority, and (b) if they remain in China after attaining their majority—whether the provisions of Rule 9 of the Chinese Regulations as promulgated on October 15th, last, are a proper construction of the law, the Secretary now directs that said rule be amended in the following manner:

"Rule 9 of the Chinese Rules approved October 15th, is hereby amended by striking therefrom paragraphs (f) and (g), by changing the letter designation of the last paragraph thereof from (h) to (g), and by inserting a new paragraph designated (f), reading as follows: '(f) The lawful wife of an American citizen of the Chinese race may be admitted for the purpose of joining her husband, and the lawful children of such a citizen partake of his citizenship and are therefore entitled to

admission. In every such case convincing evidence of citizenship and relationship shall be exacted.' "

Signed: Alfred Hampton,
Asst. Commissioner-General.

WHEREFORE, appellee respectfully submits that this Honorable Court should order a rehearing of this case.

Dated, San Francisco, Cal.,
November 6, 1918.
Respectfully submitted,

ANNETTE ABBOTT ADAMS,
United States Attorney,

C. F. TRAMUTOLO,
Asst. United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellee in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

ANNETTE ABBOTT ADAMS,
United States Attorney,

C. F. TRAMUTOLO,
Asst. United States Attorney,
Attorneys for Appellee.